GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 15129 of Richard B. Nettler on behalf of the Woodland-Normanstone Neighborhood Association, pursuant to 3200.2 and 3105.1, from the decision of Hampton Cross, Administrator and Joseph Bottner, Zoning Administrator, Building and Land Regulation Administration, made on April 4, 1989 to the effect that development of Lots 37 and 38 in Square 2140 comply with the Zoning Regulations for the construction of single-family dwellings in an R-1-A District at premises 2804 and 2808 Woodland Drive, N.W., (Square 2140, Lots 37 and 38).

Appeal No. 15136 of Phil Mendelson on behalf of Advisory Neighborhood Commission 3C, pursuant to 3200.2 and 3105.1, from the decision of the Zoning Administrator, Joseph Bottner, and the Department of Consumer and Regulatory Affairs made on June 17, 1988 and subsequently, to the effect that the subdivision and development of former Lot 33 into 7 new lots complies with the Zoning Regulations for the construction of single-family dwellings in an R-1-A District at premises 2805 and 2815 Normanstone Drive, 2804 and 2808 Woodland Drive and 2600, 2610 and 2620 Rock Creek Drive, N.W., (Square 2140, Lots 37, 38, 41, 42, 43, 45 and 46).

**HEARING DATES:** September 27 and October 4, 1989
**DECISION DATE:** December 6, 1989

## ORDER

**MOTION TO DISMISS:**

1. The property which is the subject of these appeals is located in Square 2140 and is bordered by Woodland Drive N.W. to the north, Rock Creek Drive N.W. to the east, and Normanstone Drive N.W. to the south. The property is owned by Woodland Limited Partnership. The owner subdivided the property (originally Lot 30) into seven smaller lots numbered 37, 38, 39, 40, 41, 42 and 43. This subdivision was approved by the Zoning Division of the Department of Consumer and Regulatory Affairs (DCRA) on June 14, 1988 and recorded in the Office of the Surveyor on June 17, 1988. On August 3, 1988, the Zoning Division approved a revised subdivision submitted by the owner. The revision involved resubdividing lots 39 and 40 into lots 45 and 46 respectively. The revised subdivision was recorded on October 3, 1988.

2. On June 8, 1988, the owner applied for permits to construct seven single-family houses on the subject lots. Approval was received from the office of the Zoning Administrator on August 9, 1988. On August 11, 1988, the owner obtained seven building permits for new construction. These permits are numbered B332325,

B332326, B332327, B332328, B332329, B332330, and B332333. Although the owner sought permits to construct single-family houses on lots which abut or face Rock Creek Park, the permit applications were not referred to the Commission of Fine Arts (the "Commission") for review under the Shipstead-Luce Act.

3. Construction began on lots 37 and 38 about two weeks after the building permits were issued. Because of this work, the project was brought to the attention of the Commission which then contacted the Department of Consumer and Regulatory Affairs (DCRA). By letter dated December 27, 1988, DCRA transmitted the seven building permit applications to the Commission for approval.

4. By letter dated January 25, 1989, the Commission informed DCRA that it disapproved of the plans for the seven new houses. Nonetheless, construction proceeded. The United States, on behalf of the Commission subsequently requested a Temporary Restraining Order (TRO) to halt the construction on five of the lots - 41, 42, 43, 45 and 46. No injunction was sought for lots 37 and 38 because the Commission believed the error to be that of the DCRA and substantial construction had taken place on these lots. The TRO was issued on February 10, 1989 by the United States District Court for the District of Columbia.

5. Area residents became aware of the construction and the developer's failure to submit plans to the Commission for approval. On March 23, 1989, the Woodland-Normanstone Neighborhood Association was certified as a nonprofit corporation composed of residents of Massachusetts Avenue Heights, an area bounded by Rock Creek Park to the east, Massachusetts Avenue to the south and west, and Calvert Street, Cleveland Avenue and Woodley Road to the north. The purpose of the Association is, inter alia, to preserve and enhance the physical and aesthetic characteristics of the Heights by encouraging widely spaced residential development and the maintenance of an attractive parklike setting.

On March 23, 1989, the Association formally requested that Hampton Cross, Administrator, Building and Land Regulation Administration, issue a stop-work order for all construction on the subject site on the grounds that construction on the site was not faithful to the building plans approved by the District of Columbia and that the developer was constructing residences in accordance with plans found on the site which had never been reviewed by either the District of Columbia or the Commission of Fine Arts.

6. A stop-work order was issued for work on all lots. On April 4, 1989, the developer filed revised plans with DCRA which reflected the actual development taking place on-site. On the same day, the revised plans were approved, revised building permits were issued, the stop-work order was lifted and construction proceeded.

7. On May 29, 1989, the Association filed an appeal of the decision of the Zoning Administrator, Joseph Bottner, and of Hampton Cross to approve the revised plans and to issue the revised building permits on April 4, 1989, allowing for continued construction on lots 37 and 38 according to the revised plans.

8. On June 5, 1989, Advisory Neighborhood Commission (ANC) 3C filed an appeal of the Zoning Administrator's decision of June 17, 1988 to approve the subdivision plan of the property and the subsequent decision to allow the proposed development of lots 37, 38, 41, 42, 43, 45 and 46.

9. By letter dated August 10, 1989, the appellants moved to consolidate their appeals. The motion was granted and both appeals were set for hearing on September 27, 1989. The owner/developer, Woodland Limited Partnership, participated as an intervenor.

10. On September 26, 1989, the intervenor moved for dismissal of both appeals. In its memorandum in support of the Motion to Dismiss Appeal No. 15129, the intervenor argues that the appeal was filed in an untimely fashion. Intervenor stated that construction began on the project about two weeks after issuance of the building permits on August 11, 1988. At that time, the neighbors could see that development was in progress. They were, therefore, charged with notice that building permits had been issued. Intervenor argues that the appeal should have been filed within a reasonable period of time thereafter.

11. Responding in opposition to the Motion to Dismiss, the Association stated that it is appealing the decision made on April 4, 1989 to approve the revised plans for lots 37 and 38. The Association points out that the appeal was filed on May 26, 1989, less than two months after this decision was made.

12. The intervenor stated, however, that the errors alleged by the appellant in the appeal relate to rear yard, side yard, use and height requirements. The only revision made to the plans respecting the claimed errors was in connection with the rear yard. There were no changes respecting side yard, use or height. These remained unchanged from the plans for which the original permit was issued on August 11, 1988. Therefore, the intervenor maintains that the appellant is actually appealing the original decision. Since the appeal was filed more than nine months after the original decision date and notice of the decision, the appeal is, in the intervenor's view, untimely.

13. In the memorandum supporting the Motion to Dismiss Appeal No. 15136 of ANC 3C, the intervenor stated that ANCs receive notice when subdivisions are approved and when applications are made for building permits. The intervenor stated that ANC 3C knew in August 1988 that the property had been subdivided and that building

permits were sought to develop the site. However, the ANC waited until June 5, 1990 to file the appeal, approximately ten months after notice was received.

14. The intervenor stated that under the Supplemental Rules of Practice and Procedure of the Board, an appeal from a determination of the Zoning Administrator must be made "timely." (Title 11 DCMR 3315.2). Compliance with this rule is jurisdictional and in an absence of a timely appeal, the Board is without authority to consider it. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980).

Further, the District of Columbia Court of Appeals has ruled that the question of timeliness of an appeal to the Board is based upon a standard of reasonableness. The time for filing an appeal commences where the appellant is chargeable with notice or knowledge of the decision. Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628 (D.C. 1985). This Board has held that delays of 10 1/2 months (appeal of California Steak House, BZA Appeal No. 13967, November 22, 1983); eight months (BZA Appeal No. 11872, February 14, 1975); seven months (appeal of Arthur H. Fawcett, Jr., BZA Appeal No. 11158, July 22, 1976); and nine months (appeal of Christian Embassy, Inc., BZA Appeal No. 12142, June 18, 1976) were unreasonable delays and concluded, therefore, that the Board was without jurisdiction. The Office of the Corporation Counsel, in applying the standard of reasonableness set forth in Goto, concluded that an appeal filed ninety (90) days or more after an appellant can be charged with notice is untimely. Based on this standard of reasonableness, the intervenor argues that the ANC's appeal was filed after an unreasonable period of time.

15. Advisory Neighborhood Commission (ANC) 3C maintains that the appeal should not be dismissed for a number of reasons. First, the ANC stated that it did not receive notice from the Surveyor's Office that a subdivision was applied for in June or in October 1988. The ANC first became aware of the subdivision in connection with the Commission of Fine Arts' litigation after the building permits were rejected and during the injunction. It was not until April 1989 that the ANC learned that the development plans disregarded the subdivision of record. The ANC acquired this information from deposition testimony taken on March 30 and 31, 1989 in connection with the Commission of Fine Arts lawsuit. The appeal was filed about two months later.

16. ANC 3C argued that its case can be distinguished from Woodley Park where an appeal was filed after certificates of occupancy had been issued on some of the units in the hotel. The ANC argues that in the subject appeal, however, about 70 percent (five lots) of the property remains vacant. The ANC pointed out that the developer was already enjoined from construction on almost

three-fourths of the project and therefore, it was not harmed by the timing of the appeal. It is the ANC's view that the appeal should not be dismissed because timing was reasonable given the particular circumstances.

17. The Board finds merit in the Motion to Dismiss, particularly as it relates to lots 37 and 38. For reasons more fully set forth in the conclusions of law, the Board finds that Appeal Nos. 15129 and 15136 are untimely filed as they relate to lots 37 and 38. Therefore, the Board need not address the merits of either appeal related to lots 37 and 38 in this order.

FINDINGS OF FACT:

1. The properties that are the subject of this appeal are known as premises 2805 and 2815 Normanstone Drive, N.W. and 2600, 2610 and 2620 Rock Creek Drive, N.W.

2. The appellant, ANC 3C, first alleges that the Zoning Administrator erred in certifying that the subdivision complies with the Zoning Regulations because some of the lots fail to meet the minimum lot width of 75 feet as required by 11 DCMR 401.3. Secondly, ANC 3C alleges that the Zoning Administrator erred in approving the issuance of building permits for the erection of seven houses on the subdivided lots. At least one of the lots will later be reconfigured by metes and bounds and conveyed by the owner in a way that no longer complies with the Zoning Regulations.

3. ANC 3C maintains that the construction of seven houses on a lot that formerly contained a single-family dwelling would injure the aesthetics, property values and character of the neighborhood as well as the integrity of the Zoning Regulations.

4. The subject appeals raise two issues: (1) whether the method of calculating lot width used by the Zoning Administrator was erroneous; and (2) whether the Zoning Administrator erred in approving the subdivision where the owner later intends to create a tax lot that will not comply with the Zoning Map.

Issue 1: Lot Widths

5. Pursuant to 11 DCMR 401.3, the lot width in an R-1-A District shall be a minimum of 75 feet. Recognizing that land is sometimes irregularly shaped, the Zoning Regulations define "lot width" as:

> The distance between side lot lines, measured along the building line; except that, in the case of an irregularly shaped lot, the width of the lot shall be the average distance between the side lot lines. (11 DCMR 199)

The Zoning Administrator has identified four methods to determine average lot width. None of these methods are specified in the Zoning Regulations.

A. "Average": add up the lengths of the front and rear lot lines, divide the total by two.

B. "Ten-foot interval": take measurements of the lot width every 10 feet, add them, then divide the total by the number of measurements. The measurements can be taken either from the front of the lot to the back or from the back of the lot to the front.

C. "Mean depth": add the lengths of the side lot lines, divide by two, and divide that result into the total lot area.

D. "Greatest depth": take the greatest depth (or farthest distance) of the lot and divide that into the total lot area.

6. A professional land surveyor testified as a witness for the appellant. Both the surveyor and Joseph Bottner, Zoning Administrator, gave an opinion about the validity of the methods described. The surveyor testified that the greatest depth method is not valid in most cases and is usually useful only as a quick means to approximate a lot width. The Zoning Administrator's testimony generally concurred. The surveyor stated that the averaging method is not valid unless the front and rear lines are parallel, or their divergence is within a few degrees. The Zoning Administrator generally agreed.

Both the Zoning Administrator and the surveyor testified that the ten-foot interval method is generally valid and that the mean-depth method is usually the best method for determining lot width.

7. The Zoning Administrator testified that he decides on the method to use based on the Zoning Regulations and the particular proposal under review.

8. The Zoning Administrator testified that a technician in the Office of the Zoning Administrator conducted the initial lot width calculations on the proposed plans. The appellant pointed out that the technician used the averaging method for all of the lots and found a minimum 75-foot lot width for each.

9. The initial subdivision was approved by Edgar Nunley, Acting Deputy Zoning Administrator, rather than the Zoning Administrator. However, the Zoning Administrator granted approval of the revised subdivision, and after the appeal was filed, he

recalculated the lot dimensions previously approved by Mr. Nunley to ensure compliance with the Zoning Regulations. To calculate lot width, the Zoning Administrator used only the mean depth method and found each lot to meet the minimum requirement.

10. The appellant's surveyor calculated the width of each lot using each method and found that lots 41, 42, and 43 comply using all methods, and that Lot 45 complies with all except the greatest depth method. The Board finds that no error was committed in calculating the lot widths for these lots because lots 41, 42 and 43 comply under all methods, and the Board finds that in calculating the width in Lot 45, the Zoning Administrator did not use the least valid, greatest depth method - the only method under which this lot fails to comply. The only remaining lot at issue is Lot 46.

11. Lot 46 is an irregularly shaped lot located at the northeast corner of the subdivision with Woodland Drive to the north and Rock Creek Drive to the east. Lot 45 is located to the south and Lot 38 is to the west.

12. Based on the findings of the appellant's surveyor, the appellant argues that the Zoning Administrator erred in calculating the lot width for Lot 46. The surveyor determined the lot width under each method. For each of the methods used, he considered the front of the property to be Woodland Drive rather than Rock Creek Drive. He maintains that this is consistent with the siting of the building, and it is opposite the rear yard in accordance with the building permit application approved by the Zoning Administrator and Department of Consumer and Regulatory Affairs. The surveyor stated, however, that Lot 46 complies with all methods if Rock Creek Drive is used as the front of the lot.

13. Averaging: The surveyor testified that by adding the front and rear lines of Lot 46, and dividing the total by two, the result was greater than 75 feet. However, because the front lot line is an arc, this averaging method was not valid for this lot.

The Board notes that an arc is not parallel to a straight line, and that an arc creates a longer distance than a straight line between two points.

14. Ten-foot Interval Method: Using this method the surveyor found that Lot 46 has an average width of only 73.87 feet. He testified that in using the ten-foot interval method, he drew lines parallel to the rear lot line (a straight line) rather than the front lot line (an arc).

15. Mean-Depth Method: The surveyor testified that the lot width averaged only 71.40 feet using the mean-depth method.

16. Greatest Depth Method: Finally, using this method, the surveyor calculated an average lot width of 71.01 feet.

17. The Zoning Administrator maintains that he made no error in calculating the lot width for Lot 46. The Zoning Administrator testified that he considered Rock Creek Drive as the front of the property and, using the mean-depth method, he arrived at an average lot width of 111.26 feet. Defending his method, the Zoning Administrator testified that for a corner lot, it is appropriate to use one set of side lot lines to calculate lot width and to use the other set of side lot lines to determine other dimensions on the property. He stated that the practice in the Zoning Administrator's office is to use whatever lot lines are most advantageous to the applicant and apply whatever method will make the lot comply. He further stated that there is nothing in the Zoning Regulations to prohibit this practice.

18. The appellant argues that the ten-foot interval method should have been used for Lot 46 since it is a skewed lot and this method provides a more accurate calculation for irregularly shaped lots. Using this method, Lot 46 would not comply. Appellant also contends that using different side lot lines for different purposes violates the intent, purpose and integrity of the Zoning Regulations.

19. Responding to the appellant, the Zoning Administrator testified that he was reluctant to use the ten-foot interval method after the Board's decision in Appeal No. 14649 in which the Board found this method to be inappropriate when the lot has a pan handle. The Zoning Administrator further testified that because Lot 46 complied using the mean-depth method, it was unnecessary to use an alternate method. The Zoning Administrator stated that there is no requirement to use the same method for all lots, nor is there a preference for one method over another and, because the Zoning Regulations do not prohibit the Zoning Administrator from calculating lot dimensions in the manner that he does, the intent, purpose and integrity of the Zoning Regulations are not impaired.

Issue 2: Record Lots vs. Tax Lots.

20. After the intervenor received approval of the subdivision plan for the proposed record lots, the appellant learned that the intervenor intended to later create an assessment and taxation lot out of the panhandle on record Lot 43 and convey it to the owner of Lot 42. The intervenor stated that he included the panhandle in Lot 43 because when it was part of record Lot 42, that lot failed to meet the minimum lot width requirement. Lot 43, however, does meet this requirement with the panhandle included. The intervenor also stated that to sell the panhandle as part of Lot 42 will make living better for that lot owner.

21. The appellant argues that the Zoning Administrator erred in approving the subdivision because the tax lot will not comply with the Zoning Regulations. The Zoning Administrator testified that tax lot and record lot systems are entirely separate. Record lots are buildable lots recorded in the D.C. Surveyor's Office. Only record lots are examined by the Zoning Division to determine whether a development proposal complies with the Zoning Regulations. Tax lots relate to who owns a particular piece of property. He stated that he can do nothing to prevent a property owner from creating a tax lot that may be inconsistent with the Zoning Regulations by using a metes and bounds description.

22. On October 20, 1989, the intervenor entered into a settlement agreement with the Commission of Fine Arts. This agreement constitutes settlement of the lawsuit between the Commission and the intervenor. After entering into this agreement, the intervenor proceeded with the development of Lot 46 pursuant to the agreed upon terms.

23. On October 24, 1989, the intervenor filed a motion requesting the Board to reopen the record to allow a copy of the settlement agreement to be made part of the record in the appeal. Responses supporting the motion were submitted by both appellants.

24. On November 6, 1989, the appellants filed a motion requesting the Board to enter an order staying all construction on Lot 46 until the Board enters an order on the appeals. The intervenor expressed opposition to the emergency stay requested by the appellants.

25. At a Special Public Meeting on November 15, 1989, the Board granted the emergency stay until December 6, 1989, the date on which the Board would decide the appeals.

26. On November 28, 1989, the appellants filed a second joint motion for an emergency stay of all construction on Lot 46 either until the appellants receive a favorable Board decision or until an unfavorable Board decision is appealed. The intervenor was opposed to the motion.

27. At its Public Meeting of December 6, 1989, the Board reopened the record to receive the settlement agreement in which the intervenor agreed, inter alia, to build no more than three houses on lots 41, 42, 43 and 45. This would require a resubdivision of these lots. The intervenor pointed out that such a resubdivision will render moot any issues raised by the appellant over the creation of a tax lot on Lot 42. The agreement also provided that the parties would move to dissolve the outstanding temporary restraining order.

28. In deciding the merits of the appeal, the Board effectively rendered moot the motion for an emergency stay dated November 28, 1989.

CONCLUSIONS OF LAW AND OPINION:

The Board concludes that both appellants are chargeable with constructive notice of the right to appeal when construction began on lots 37 and 38. The failure to receive actual notice from the Surveyor's Office or from DCRA does not alter the fact that the appellants' members were aware that construction had begun, that the property must have been subdivided and that building permits must have been issued. It was then the obligation of the appellants to proceed expeditiously to inquire about the appropriateness of the subdivision and the decision to issue building permits. To the contrary, when the appeals were filed, approximately eight months later, the houses on lots 37 and 38 were substantially complete.

The Board therefore concludes that the appeals, as they relate to lots 37 and 38 were filed after an unreasonable period of time given the circumstances. The Board therefore will dismiss Appeal No. 15129 in its entirety and any aspect of Appeal No. 15136 which relates to lots 37 and 38. The Board concludes that the remaining portion of Appeal No. 15136 related to lots 41, 42, 43, 45 and 46 was filed in a timely fashion and will, therefore, be decided on the merits.

Based on the foregoing findings of fact and evidence of record, the Board concludes that the Zoning Regulations do not set forth the various methods for calculating lot width. Consequently, no preferred method has been established in these regulations. Although Lot 46 is a skewed lot, nothing in the Zoning Regulations prohibits the use of the mean-depth method for calculating the width of such a lot. It is the opinion of the Board that the Zoning Administrator's decision to use the mean-depth method was reasonable and not inconsistent with the Zoning Regulations. The Board concludes that the subdivision, as approved by the Zoning Administrator, complies with the Zoning Regulations and that the Zoning Administrator did not err in calculating the lot widths as alleged by the appellant.

As to the issue of tax lots, the Board concludes that record lots, not tax lots, are used to ascertain compliance with the Zoning Regulations. The Board further concludes that the Zoning Administrator acted properly in determining that the record lot subdivision meets the Zoning Regulations and that the possibility that a tax lot will subsequently be created was not germane to his decision.

Based on the foregoing, it is the decision of the Board to **DISMISS** in part and **DENY** in part the appeals and uphold the decision of the Zoning Administrator.

VOTE: 5-0 (Maybelle Taylor Bennett, Charles R. Norris, Paula L. Jewell, William F. McIntosh and Carrie L. Thornhill to dismiss Appeal No. 15129 and portions of Appeal No. 15136 related to lots 37 and 38).

VOTE: 5-0 (Charles R. Norris, Maybelle Taylor Bennett, Paula L. Jewell, William F. McIntosh and Carrie L. Thornhill to deny the remainder of Appeal No. 15136).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

**ATTESTED BY:** Madeliene H. Robinson

**MADELIENE H. ROBINSON**
**Acting Director**

**FINAL DATE OF ORDER:** APR 24 1992

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

**15129 & 15136 Orders/bhs**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15129 & 15136

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on APR 24 1992 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Madeliene H. Robinson

MADELIENE H. ROBINSON
Acting Director

DATE: APR 24 1992

15129 & 15136Att/bhs